



IT IS ORDERED as set forth below:

Date: February 13, 2012

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

In Re:	:	Chapter 13
	:	
Ardell Smith White,	:	Case No. 11-67119
	:	
Debtor.	:	Judge Diehl
	:	
Bank of America, N.A.,	:	
	:	
Movant,	:	
v.	:	
	:	Contested Matter
Ardell Smith White and Mary Ida	:	
Townson, Chapter 13 Trustee,	:	
	:	
Respondents.	:	

**ORDER GRANTING BANK OF AMERICA, N.A.'S MOTIONS TO SET ASIDE AND
RECONSIDER THE CONFIRMATION ORDER AND ORDER GRANTING DEBTOR'S
MOTION TO DETERMINE SECURED STATUS OF CLAIM OF BANK OF AMERICA
AND NOTICE OF HEARING**

On February 8, 2012, a hearing on two motions to reconsider and set aside an order ("Motions") filed by Bank of America, N.A. ("BOA") were heard. (Docket Nos. 31 & 36). Present

at the hearing were Mark Baker of Johnson& Freedman, LLC for BOA, Kristina Smith of Semrad & Associates, LLC for Debtor, and K. Edward Safir, counsel for the Chapter 13 Trustee Mary Ida Townson.

BOA sought reconsideration of the December 1, 2011 confirmation order and the December 22, 2011 order granting Debtor's motion to determine the secured status of BOA's claim. (Docket Nos. 28 & 33). BOA's Motions to reconsider were timely filed under Bankruptcy Local Rule 9023-1. At the hearing, BOA's Motions were granted, and this Order memorializes the Court's ruling. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B) and venue is proper.

BOA's Motions concern treatment of its claim secured by Debtor's rental property – 1374 Northwest Dr., NW, Atlanta, Georgia 30318. BOA holds the first and second priority security deeds on the property, but the treatment and secured status of the first priority security deed is the only issue in dispute. Based on its first priority deed to secure debt, BOA filed a secured proof of claim in the amount of \$61,004.99. (Claim No. 9).

The confirmed plan treats BOA's claim in two areas of the plan. Both relevant plan provisions are within the 6(A) section of Debtor's plan, titled "Secured Claims: Claims Secured by Personal Property Which Debtor Intends to Retain." Adequate protection payments to BOA are designated at \$100 per month in the plan section 6(A)(i), which is subtitled: "Pre-confirmation adequate protection payments." BOA is also treated under section 6(A)(ii)(c), which is subtitled, "Post confirmation payments: Other provisions." In section 6(A)(ii)(c) of the confirmed plan, BOA's claim is valued at \$13,000.00 (designated as the replacement value) with a 4.25% interest rate on monthly payments of \$100.00 increasing to \$487.00 in March of 2012. There was no creditor opposition to the plan at the November 9, 2011 confirmation hearing. After the hearing, BOA filed an objection to confirmation. (Docket Nos. 23 & 25)

Debtor's motion to determine the secured status of BOA's claim was unopposed at the November 9, 2011 hearing. Debtor's motion referenced and included an appraisal valuing the property at \$13,000.00. The Order granting Debtor's motion finds that BOA's claim is partially unsecured pursuant to § 506(a) and (d) because the value of the property to which the lien attaches is less than BOA's claim amount. The Order bifurcated BOA's claim, finding the secured portion of BOA's claim to be \$13,000.00 and treated under the term of the plan at 4.25%. BOA filed a written objection to the motion following the hearing on November 15, 2011. (Docket No. 26).

BOA's Motions seek relief under Bankruptcy Rules of Federal Procedure 9013 and 9024, which incorporates Federal Rule of Civil Procedure 60, and Local Rule 9023-1. BOA's Motions were filed within the 14-day reconsideration period provided by Bankruptcy Local Rule 9023-1, N.D. Ga. BOA requests that the confirmation order and the motion to determine the secured status of BOA's claim be reconsidered. BOA also seeks these orders under Rule 60(b)(1), which allows for relief from a judgment on the basis of mistake, inadvertence, or excusable neglect. BOA cites excusable neglect, stating that it mis-calendared the hearing date for both of these matters. Additionally, BOA asserts that treatment of its claim in the plan under the personal property section creates a due process issue, citing the Supreme Court's ruling in *U.S. Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 176 L. Ed.2d 158 (2010).

The decision to alter or amend a judgment is highly discretionary. *Am. Home Assurance Co. v. Glenn Estess & Assocs.*, 763 F.2d 1237, 1238-39 (11th Cir.1985). The standard for setting aside a default judgment for excusable neglect is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Investment Services Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 395 (1993) (ruling that carelessness within the

control of a defaulting party can constitute excusable neglect). Factors considered when making this determination include whether (1) the nonmoving party is prejudiced; (2) the length of the delay and its effect on judicial proceedings; (3) the reason for the delay; and 4) whether the moving party acted in good faith. *Id.* at 395. In applying the *Pioneer* standard, the Eleventh Circuit has required a movant to show (1) a meritorious defense that might affect the outcome; (2) a lack of prejudice to the nonmoving party; and (3) a good reason for the default. *Valdez v. Feltman (In re Worldwide Web Systems, Inc.)*, 328 F.3d 1291, 1295 (11th Cir. 2003).

BOA asserts that it has a meritorious defense relating to Debtor's valuation of the property at issue. BOA also raises due process concerns with respect to its treatment in the plan. The plan's inclusion and treatment of BOA's claim in the personal property section of the claim is erroneous and potentially lacks meaningful notice. Additionally, § 1325(a) requires the Court to ensure the confirmation requirements are satisfied even in the absence of objections. *U.S. Aid Funds, Inc. v. Espinosa*, 130 S. Ct. at 1380-81. Given the timeliness of BOA's Motions, the asserted valuation defense, the plan's erroneous classification of BOA's claim as personal property, and the lack of prejudice to Debtor, there is a sufficient basis to grant BOA's Motions. Accordingly, it is hereby

ORDERED that Bank of America N.A.'s Motions to Reconsider and Set Aside (1) the Confirmation Order and (2) the Order granting Debtor's Motion to Determine Secured Status of Bank of America's Claim are **GRANTED**.

It is **FURTHER ORDERED** that the December 1, 2011 Order Confirming Plan (Docket No. 28) and the December 22, 2011 Order Granting Debtor's Motion to Determine Secured Status of Claim of Bank of America, N.A. (Docket No. 33) are hereby **VACATED**. This Order suspends the

Chapter 13 Trustee's disbursement of funds under the Plan but does not require the Chapter 13 Trustee to seek return of previously disbursed funds.

It is **FURTHER ORDERED and NOTICE IS HEREBY GIVEN** that a hearing on confirmation and Debtor's Motion to Determine Secured Status of Claim of Bank of America, N.A. will be held before the undersigned on **March 14, 2012 at 10:30 a.m., Room 1201, United States Courthouse, 75 Spring Street, S.W., Atlanta, GA 30303.**

If counsel plans to present evidence and exhibits at the hearing, then two copies of marked exhibits and a list of all exhibits should be provided to the Courtroom Deputy Clerk on before **March 9, 2012.** The parties shall also submit a separate, typed list of each party's objections to the exhibits of the other party. Any listed document to which an objection is not raised shall be deemed to have been stipulated as to authenticity by the parties, and such documents will be admitted at hearing without further proof of authenticity.

The Clerk's Office is directed to serve a copy of this Order upon Debtor, Debtor's counsel, Chapter 13 Trustee, and the party on the attached distribution list.

END OF DOCUMENT

Distribution List:

Mark Baker
Brandi Lesesne
Johnson & Freedman, LLC
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